UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

Albert Gray, Administrator, et al. Plaintiffs, v. Jeffrey Derderian, et al. Defendants.	: : : : : :	CA 04-312L ✓
Estate of Jude B. Henault, et al., Plaintiffs, v. American Foam Corporation, et al., Defendants.	: : : : : :	CA 03-483L

DEFENDANTS STATE OF RHODE ISLAND AND IRVING J. OWENS' REPLY MEMORANDUM TO GRAY PLAINTIFFS' SECOND MEMORANDUM IN SUPPORT OF THEIR OBJECTION TO DEFENDANTS' MOTION TO DISMISS

I. Introduction

A. Eleventh Amendment

Plaintiffs misconstrue Rhode Island's sovereign protections under the Eleventh Amendment. They rightfully assert that to the extent the Tort Claims Act is a waiver of immunity, there is no Eleventh Amendment protection. They do not, however, acknowledge that the Rhode Island Supreme Court has held that both the Public Duty Doctrine and quasi-judicial immunity are exceptions to the Tort Claims Act. Thus, to the extent either of these immunities protects Rhode Island, there is no waiver. Again, these immunities go to the very core of Rhode Island's sovereign rights and if this Court doubts

that they apply, the State requests that appropriate questions be certified to the Rhode Island Supreme Court, which is the final arbiter of State law.

B. Immunity

Despite filing an additional Memorandum in Objection to the State's Motion to Dismiss, plaintiffs have still not produced any authority for the proposition that the State is liable to unknown third parties for the acts of governing alleged in these complaints. Equally important, they have still not alleged all the elements of an exception to the Public Duty Doctrine and, therefore, they have not stated a claim against these defendants. Without such authority plaintiffs repeated assertions that a Motion to Dismiss is not appropriate must fail.

The Rhode Island Supreme Court has analyzed every inspection case that reached it under the Public Duty Doctrine because, contrary to plaintiffs' assertions, inspections such as the ones at issue herein are clearly acts of governance unlike any private inspection. See Mall of Coventry Joint Venture v. McLeod, 721 A.2d 865, 868 (R.I. 1998).[1] These decisions unequivocally hold that a government agency can be liable to the owner of a building if, and only if, that owner can establish an exception to the Public Duty Doctrine. No Rhode Island case has ever extended the government's "duty" to inspect (if any) beyond an actual known owner of the structure. No plaintiff herein has asserted that he or she was anything other than a member of the general public in attendance at the performance of a musical event open to the public at large. Since no plaintiff can allege that he or she falls within the "specifically identifiable exception" to the Public Duty Doctrine, they all seek to assert an "egregious" exception. As shown

[1] "There is no question that DEM was acting in a governmental capacity in passing upon Mall Venture's application to alter a wetland." Id. at 869.

infra, no plaintiff has been able to allege the elements necessary to establish a legal duty even under that exception.

II. Plaintiffs Have Not Alleged The Elements Of An Egregious Exception

Plaintiffs acknowledge that an essential element of the egregious conduct exception to the Public Duty Doctrine is that the government "created a circumstance that forced an individual into a position of peril." Memorandum at 6.[2] The fact remains that plaintiffs have not and cannot allege that the State placed foam at the Station, ignited pyrotechnics at the Station, could have licensed the use of pyrotechnics or otherwise created the circumstances that led to this tragic fire. Reviewing the complaint(s) most favorably to plaintiffs, they allege only that the State's "duty" was to inspect an establishment to see if other persons had complied with certain Rhode Island laws. These allegations do not translate as a tort duty that establishes liability to third parties.

In Mall of Coventry Joint Venture v. McLeod, 721 A.2d 865, 868 (R.I. 1998) the Supreme Court reviewed allegations that a DEM engineer had negligently inspected a wetlands and that his negligence caused a developer damages. The Court ruled, however, that neither the duty to inspect nor the actual inspection created a legal duty on the government *even to the developer*[3] nor did it transfer the obligation to comply with the law from the developer to DEM.[4] This is an especially instructive case because the DEM engineer did not simply miss violations, he actually delineated a wetlands by placing flags to indicate the boundaries of the undevelopable area and the developer relied on

---

[2] As used herein, "Memorandum" shall refer to the second Memorandum of the Plaintiffs in Gray In Support of their Objection To The Motion To Dismiss Filed by State of Rhode Island and Owens.

[3] "[W]e are of the opinion that (the trial justice) was correct in determining that DEM had not violated any duty to Mall Venture." Id. at 868.

[4] "The duty to depict accurately the location of wetlands was properly the duty of Mall Venture...." Id. at 868. It was not, the Court held, the government's duty to identify the wetlands for the developer even though the Government had inspected the property and had actually negligently flagged the wetlands.

those flags in negotiating with Stop & Shop. As a matter of law, however, the Supreme Court found that the government could not be liable for these negligent acts.

Plaintiffs contend that the breach of this perceived "duty" entitles them to damages as unknown members of the general public who were in attendance at an event open to all persons. Since they cannot assert that they were specifically identifiable as defined by the Rhode Island Supreme Court, they base their claim to liability on an "egregious" exception to the Public Duty Doctrine. No Rhode Island inspection case, however, has ever found an exception to the Public Duty Doctrine based on the egregious exception because none of them has ever found that the government "created circumstances that forced reasonable prudent person into extreme peril." See Haley v. Town of Lincoln, 611 A.2d 849, (RI 1992). Simply put, there is no such allegation in any complaint on file herein, either, and, in fact, it is clear from the complaints that there cannot be any such allegation.

III. R.I. Gen. Laws 23-28.2-17 Protects Both Mr. Owens and the State

Defendant Owens does have the broadest possible immunity for his acts in that he is protected judicially by the Public Duty Doctrine and legislatively by R.I. Gen. Laws 23-28.2-17.[5] Again, it is Rhode Island Law that controls this motion and that law does not create liability for the governmental employer when the actual actor is immune for the alleged conduct.

Contrary to plaintiffs' claim (Memorandum at 11) Schultz v Foster-Gloucester Regional School District, 755 A.2d 153 (RI 2000) does not "implicitly" hold that

[5] Plaintiffs assertion that Denis Larocque is "alleged" to be an agent for the State does not affect this motion. The stipulation is that plaintiffs "alleged" that. It is not that this is anything more than a "bald assertion" that the court need give no weight. Rodi v. Southern New England School of Law, 389 F.3d 5 (1st Cir. 2004).

statutory immunity to an employee does not extend to the employer. Rather, the Schultz Court found the plaintiff was a specifically identifiable person and remanded the case against *all* named defendants. The numerous members of the public who comprise the plaintiffs herein cannot make such allegations.

Plaintiffs continued use of the word "implicit" (Memorandum at 13-14) merely means that there is no legal authority to support their statements. Despite their claim that some "implicit" ruling in Haworth[6] or Quality Court Condominiums[7] separated a governmental employee from an employer in evaluating immunity, neither case supports those statements. State immunity has always extended or not extended to both employee and employer in Rhode Island.

III. In Rhode Island Quasi-Judicial Immunity Broadly Protects for Discretionary Acts

It is interesting that when plaintiffs speak of one immunity they claim that: "The only meaningful issue is whether or not (suit is) maintainable under Rhode Island law." Memorandum at 4. Yet when they address Rhode Island's very expansive doctrine of Quasi-Judicial Immunity they seek to limit the Rhode Island Supreme Court's rulings with foreign cases. Memorandum 18-20.

The fact is that the Rhode Island Supreme Court has taken an expansive view of Quasi-Judicial immunity for the discretionary actions of government employees. See Mall at Coventry Joint Venture v. McLoad, 721 A.2d 865 (RI 1998); Psilopoulas v State of Rhode Island, 636 A.2d 727 (RI 1994). As stated in more detail in these defendants' original Memorandum in support of their Motion to Dismiss, Fire Marshals, like other

[6] 813 A 2d 62 (RI 2003)
[7] 641 A 2d 746 (RI 1994)

inspectors possess discretion in performing their duties.[8] Plaintiffs, as they must, concede that Rhode Island law vests these inspectors with discretion ("may" order, RI fire safety code 1-4.4) as does the wetlands law at issue in Mall of Coventry that led to a finding of quasi-judicial immunity for DEM. To avoid this doctrine *as defined by the Rhode Island Supreme Court*, plaintiffs urge this Court to avoid the plain, ordinary meaning of the word "may" and to re-write §1-4.4 using the word "shall." It is clear, however, that under Rhode Island law this is an improper request as Courts must give the meaning of codes their plain ordinary meanings. See D'Amico v. Johnston Partners, No. 2004-3-A (R.I. Feb. 1, 2005) at 3 citing Accent Store Design Inc., v. Marathon House, Inc., 674 A.2d 1223, 1226 (R.I. 1996). Thus, under Rhode Island law, "may" does not mean "shall." Rather, the plain and ordinary meaning of "may" calls for the exercise of discretion.

V. Plaintiffs Must Depend on Regulatory Enactments to Support Their Assertions of a Legal Duty

Plaintiffs' assertion that they do not depend on regulatory enactments to create a cause of action herein must fail for several reasons. First, only regulatory enactments compelled the inspection(s) on which plaintiffs base their claims. They have not alleged the voluntary undertaking of any "duty." Second, the Rhode Island Supreme Court has recognized these enactments (or, rather, their breach) as the basis or trigger for a claim of "duty" in the handful of inspection cases reviewed by the court. See also footnote 3 in State's Reply Memorandum to Motion to Dismiss. The Rhode Island Supreme Court - not out of State Courts - has made clear that these inspections are governmental functions

[8] Note that quasi-judicial immunity is also an exception to the waiver of sovereign immunity in Rhode Island's Tort Claims Act (Mall at Coventry, supra at 869) and, therefore, supports an Eleventh Amendment defense also.

protected by the Public Duty Doctrine and only in the rare cases in which a plaintiff can establish an exception to the Public Duty Doctrine will there be a fact issue of liability. Any citation to out of state cases discussing a common law duty related to governmental inspections are contrary to the Rhode Island decisions.

Unsupported allegations of criminal conduct in no way affect immunity under the Public Duty Doctrine. Note at the outset that no government defendant has been charged with a crime and the entire issue, as shown in the prior Memorandum of West Warwick (at whom this allegation is directed) is simply a distraction from the real issues in this case. Without a viable exception to the Public Duty Doctrine, without a legal finding of duty to unknown members of the general public in attendance at a public event and without a legal finding of proximate cause, these defendants cannot be proper parties to this action under any theory.

VI. The Complaints Still Plead Intervening Causes As A Matter Of Law

Plaintiffs' Amended Complaint is simply an attempt to shield their allegations of acts that constitute intervening causes from scrutiny and, thereby, avoid dismissal through crafty pleading. Plaintiffs' attempt to cast the factual allegations made in counts against other defendants as " alternative claims," which cannot be used as admissions against them in evaluating the validity of their claims against these defendants, must be rejected. Even a cursory reading of the Amended Complaint reveals all factual allegations are not made "in the alternative," but instead, are entirely consistent with one another and are made serially and in tandem.

None of these changes or additions alter the fact that these defendants are entitled to dismissal of all counts against them on the grounds that the pleadings themselves

establish no duty to Plaintiffs and that these defendants' acts or omissions were not the proximate cause of Plaintiffs' alleged injuries.

1. Plaintiffs' Factual Allegations Are Not Plead "In The Alternative" And Constitute Binding Admissions Of Intervening Acts, Which Preclude A Finding Of Proximate Cause Against These Defendants

Plaintiffs have argued the myriad intervening acts that occurred between governmental inspections and the alleged injuries were foreseeable to the State. Plaintiffs now appear to argue that, in addition to being foreseeable, the intervening acts set forth in the Master Complaint and reiterated in the Amended Complaint, are somehow inconsistent with, or plead in the alternative to the allegations against the State. Plaintiffs' arguments are without merit.

Realizing the allegations of the Amended Complaint pose a serious threat of dismissal, Plaintiffs attempt to invoke Fed. R. Civ. P. 8(e)(2) alternative pleading to avoid the inescapable consequences of their own allegations of intervening acts. Plaintiffs' assertion that under the alternative pleading rules, their claims against any defendant other than the State are not judicial admissions of the intervening acts of others fails because such claims are not truly made "in the alternative" at all.

An alternative claim typically takes the form of an "either-or" allegation and, thereby, permits the pleading of ***inconsistent facts.*** See, e.g., Schott Motorcycle Supply, Inc. v. American Honda Motor Co., Inc., 976 F. 2d. 58, 62 (1st Cir. 1992); Holman v. Indiana, 211 F. 3d 399 (7th Cir. 2000). For example, in Holman, a husband and wife each asserted a claim of sexual harassment against their common supervisor. Facing dismissal under Rule 12(b)(6) – because their pleading established that the supervisor was an "equal opportunity harasser" and, therefore, had not discriminated against either of them

on the basis of sex – the two contended that claims were made in the alternative, i.e. that the supervisor had harassed one or the other of them, but not both. The court rejected their argument, stating:

> While the Holmans need not use particular words to plead in the alternative, they must use a formulation from which it can be reasonably inferred that this is what they were doing. The "liberal construction accorded a pleading under Rule 8(f) does not require the courts to fabricate a claim that a plaintiff has not spelled out in this pleading." And while we must draw *reasonable* inferences in the Holmans' favor, we should not draw inferences that while theoretically plausible are inconsistent with the pleadings. Here, the Holmans did not attempt to plead in the alternative; they clearly pleaded in tandem.

Holman, 211 F.l3d at 407 (internal citations omitted)(emphasis in the original).

While Rule 8 allows pleading in the alternative, factual allegations that are in no way inconsistent with other factual allegations are **not** plead in the alternative and constitute judicial admissions. Royal Consulting, Inc. v. Agri-Mark, 1990 WL 83445. *3 (S.D.N.Y. June 13, 1990)(noting that pleading in the alternative was allowed under the federal rules, but recognizing that "facts statements made in the pleading and not contradicted in alternative pleading remain admissions"). If this were not true, any plaintiff could avoid the inescapable consequences of pleading facts that would entitle a defendant to dismissal by simply labeling such allegations "in the alternative." Such is not the purpose or the effect of Rule 8.

None of Plaintiffs' claims against the various defendants are set forth in the form of "either-or" allegations. Nor are any of Plaintiffs theories of recovery against the State, including the factual allegations supporting such theories, in any way inconsistent with the other facts alleged. Instead, even a cursory review of Plaintiffs' allegations reveals

the Amended Complaint sets forth several **entirely consistent** theories of recovery against multiple defendants. As in Holman, Plaintiffs have pleaded their claims against the various defendants in tandem, not in the alternative. Indeed, Plaintiffs allege a consistent series of facts purportedly creating liability for multiple defendants. The individual facts within this series are not only consistent with one another, but are *necessary perquisites to Plaintiffs' claims against the State.* For example, the intervening acts alleged by Plaintiffs are, quite simply, necessary to the liability Plaintiffs seek to impose on the State. Plaintiffs' attempt to compartmentalize portions of this series of events in order to avoid their consequences must fail as none are plead "in the alternative" within the meaning of Rule 8.

The mere fact Plaintiffs have now chosen not to incorporate their factual allegations against other defendants into their counts against the State does not alter the consistent and serial nature of these allegations. Indeed, Plaintiffs' allegations of intervening acts are **necessarily** incorporated as they form the required underpinnings of Plaintiffs' allegation that these **very same acts** were foreseeable to the State. In order to allege such intervening acts were foreseeable to the State, Plaintiffs necessarily must plead the factual prerequisite - that the intervening acts occurred. Plaintiffs cannot simultaneously pretend such intervening acts cannot be considered as part of the well-pleaded factual allegations against the State for the purpose of rule 12(b)(6) analysis.

As discussed fully in the State's original Motion to Dismiss, the intervening acts alleged by Plaintiffs require dismissal of all claims asserted against the State in the Amended Complaint as proximate causation, a necessary element of Plaintiffs' claims, cannot be shown.

VII. Conclusion

A series of illegal acts occurring in succession caused the ignition at the Station nightclub. These defendants are being sued for acts of governance related solely to some of the initial acts by members of the general public who were unknown to the inspectors prior to the fire. As shown infra, these facts do not establish liability for these parties as they do not establish the legal elements of duty or proximate cause.

Respectfully submitted,

DEFENDANTS STATE OF RHODE ISLAND
AND IRVING J. OWENS

By Their Attorney,

PATRICK C. LYNCH
ATTORNEY GENERAL

James R. Lee (#4305)
Assistant Attorney General
150 South Main Street
Providence, Rhode Island 02903
TEL: (401) 274-4400, Ext. 2314
FAX: (401) 222-2995

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the 4th day of February, 2005, a copy of the within was e-mailed to the certification list.

angelonelaw@aol.com;
atrevelise@reedsmith.com;
Bkeller@debevoise.com;
boyerlaw1@aol.com;
Brian@briancunha.com;
CBabcock@jw.com;
cdiedrich@sloanewalsh.com;
cfallon@cozen.com;
credihan@KPRLaw.com;
dlamontagne@zizikpowers.com;
dmaroney@kkrs.com;
ecrane@skadden.com;
ehinchey@sloanewalsh.com;
emcpherson@m-klaw.com;
esommers@vetterandwhite.com;
fkelly@nixonpeabody.com;
flasalle@lasallelaw.com;
fogerty@halloran-sage.com;
Georgia.Sullivan@thehartford.com;
Gwolf@shb.com;
hmerten@vetterandwhite.com;
inmantourgeelaw@aol.com;
jmargolis@debevoise.com;
Joan Palmer;
johnmahoney@amlawllp.com;
jreilly@kkrs.com;
jrestivo@reedsmith.com;
jrojas@goodwin.com;
jruggieri@hcc-law.com;
jtm@hansoncurran.com;
jvc@blishcavlaw.com;
ker@blishcavlaw.com;
knm@hansoncurran.com;
lwilkins@smithbrink.com;
mcahill@choate.com;
mfm@lmkbw.com;
mhadden@mhaddenlaw.com;
mikesp@rrsplaw.com;
mnugent@morrisonmahoney.com;
MRD@gsm-law.com;
msmandell@msn.com;
pjones@cmj-law.com;
pvsullivan@morrisonmahoney.com;
rbengtson@ckmlaw.com;
Reardonlaw@aol.com;
Resminilaw@yahoo.com;

ricedolank@aol.com;
rlanglois@smithbrink.com;
rmacadams@mandwlaw.com;
rmonaco.c-l@snet.net;
rsouza@nixonpeabody.com;
sbreggia@bbglaw.us;
singinglawyer@msn.com;
smacgillivray@edwardsangell.com;
SMinicucci@calvinolaw.com;
sohohomes@yahoo.com;
sprignano@edwardsangell.com;
stucker@ths-law.com;
swettle@fbtlaw.com;
tdemarco@conversent.net;
tlyons@straussfactor.com;
tmcgough@reedsmith.com;
wvenditti@wistbar.com